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No. 05-648

Supreme Court, U.S.
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In The
Supreme Court of the United States

FREEDMAN SEATING COMPANY,

Petitioner,

vs.

AMERICAN SEATING COMPANY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Freedman's petition presents this Court with the question of whether a court can find non-equivalence between an element of an accused device and an element of a patent claim, where there is no genuine factual dispute that either (i) the claimed and accused elements are interchangeable, or (ii) the accused element performs the same function in the same way to achieve the same result as the claimed element. As Freedman demonstrated in its petition, the Federal Circuit's decision in this case improperly applied the "doctrine of equivalents," in a manner which directly conflicts with this Court's precedent, to find non-infringement as a matter of law.

Respondents' brief in opposition ("Opp.") carefully ignores the question raised by Freedman's petition, by attempting to now suggest that there are contested issues of material fact – which would have precluded the Federal Circuit's finding of noninfringement as a matter of law in the first place. In so doing, Respondents attempt to erroneously suggest the existence of purported factual "inaccuracies" in Freedman's petition. Indeed, Respondents do not even address the crux of Freedman's argument, namely, the issues of (i) whether the Federal Circuit's attempt to limit the doctrine of equivalents through its "foreseeability" doctrine is inconsistent with this Court's precedent, and (ii) whether a court can disregard the fact that the "function-way-result" test is met by an accused device, to find non-equivalence as a matter of law.

As shown below, however, Respondents' claims are not supported by the record. Accordingly, Respondents' brief in opposition fails to raise any legitimate reason for denial of Freedman's petition.

A. Respondents' Claim that "Petitioner's Questions are Not Presented in This Case" is Not Supported by the Record

For their first purported reason for denying Freedman's petition, Respondents erroneously state that "the questions posed by petitioner are not factually presented by this case" (Opp. 3). Specifically, Respondents claim that (a) certain factual issues relevant to the questions presented were "disputed" below, thereby suggesting that a genuine issue of material fact existed as to those issues, and (b) the questions presented by Freedman purportedly do not specify the "elements" at issue. However, Respondents' contentions are not at all supported by the record before this Court, as shown below.

1. The purported "disputes" identified by Respondents did not involve any genuine issues of material fact

First, Respondents claim that the issue of "whether the diagonal truss of the accused EZ Fold in fact performs the same function in the same way to achieve the same result as the claimed structure" was somehow "disputed" below (Opp. 3) – thereby suggesting that a genuine issue of material fact existed on this issue in the courts below. Respondents are wrong. Of course, if Respondents are correct, and there were disputed issues of material fact, then neither the district court nor the Federal Circuit could have ruled on the issue of infringement of the '389 patent under the doctrine of equivalents, as a matter of law. Indeed, if there were disputed issues of material fact, those issues would had to have been tried before the district court. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding that summary judgment can be granted only if no "reasonable jury could return a verdict for the nonmoving party").

Indeed, as the district court noted in granting summary judgment to Freedman on the issue of infringement,

Respondents' argument that the accused EZ Fold seat did not infringe the '389 patent under the doctrine of equivalents was based **solely** on purported differences between the **distribution of forces** in the accused EZ Fold seat and in the preferred embodiment of the '389 patent (App. 49-51). However, the district court found that Respondents' argument "focusing on the differences in the use of force on the seatbase . . . is marginally, if at all relevant," and held that Respondents failed to raise **any** genuine issue of material fact (App. 50). Thus, the district court found, there was no genuine issue of material fact that the "function-way-result" test was met by the "moveable end" in the accused EZ Fold seat, as a result of which the EZ Fold seat infringed the '389 patent under the doctrine of equivalents (App. 50-51). While Respondents may have "disputed" the issue of whether the "function-way-result" test was met in this case, the record clearly indicates that Respondents offered no evidence sufficient to create a **genuine** issue of **material** fact on that issue.

Moreover, the Federal Circuit did **not** hold the district court's finding that the "function-way-result" test had been met to have been erroneous. Indeed, the Federal Circuit never even addressed Respondents' argument that the "function-way-result" test was not met because of purported differences in force distribution between the accused EZ Fold seat and the preferred embodiment of the '389 patent, which Respondents had once again asserted on appeal. Instead, the Federal Circuit made no finding whatsoever that *any* genuine issue of material fact existed in this case with regard to the application of the "function-way-result" test. Accordingly, contrary to Respondents' suggestion, the record simply does not reflect the existence of any **genuine** issue of **material** fact relating to the application of the "function-way-result" test in this case.

Additionally, while Respondents claim that "[i]nterchangeability of the overall truss mechanisms was disputed" below (Opp. 3), the record clearly shows this statement to be false. To the contrary, both Freedman and

Respondents agreed below that the type of four-bar mechanisms utilized in the preferred embodiment of Freedman's '389 patent (referred to below as a "slider-crank" mechanism) and in the accused EZ Fold seat were, for all practical purposes, **interchangeable**. Indeed, the Federal Circuit acknowledged Respondents' claim that the two types of four-bar mechanisms were interchangeable:

[Respondents] argue that, at the time of filing for the '389 patent, the interchangeability of four bar mechanisms was foreseeable to one of skill in the art. [Respondents state] that this is significant because, while Freedman could have chosen to claim a fourth link mechanism (or even all types of four bar mechanisms), it chose to narrowly claim a slider-crank mechanism.

(App. 14). Further, the Federal Circuit expressly noted, in view of Freedman's awareness of this interchangeability, that its purported "decision" to limit its claims to slider-crank mechanisms was important (App. 25).

Clearly, both Freedman and Respondents were in agreement below that the two types of four-bar mechanisms employed in the accused EZ Fold seat and the preferred embodiment of the '389 patent were **interchangeable** with one another. The only **genuine** dispute on that issue was a legal one, not a factual one – namely, what effect that interchangeability had on the application of the doctrine of equivalents in this case. Thus, Respondents' claim of a purported factual "dispute" relating to the interchangeability of the two types of truss mechanisms is simply not supported by the record.

2. The "elements" at issue in the questions presented were clearly defined in Freedman's petition

Respondents also claim that Freedman's petition should be denied because the questions presented by Freedman purportedly "do not specify the 'elements'" at issue in this case (Opp. 3). Once again, Respondents'

position is not supported by the record. Clearly, the body of Freedman's petition establishes that the "elements" at issue are the "moveable end" of the '389 patent claims and the corresponding "moveable end" of the diagonal truss in Respondents' accused EZ Fold seat.¹ Respondents' suggestion that Freedman's petition should be denied because the questions presented do not "specify the elements" has no basis in law or fact, and therefore fails to raise a legitimate reason for denial of Freedman's petition.

Furthermore, Respondents' argument blatantly mischaracterizes the record below, by falsely stating that "Freedman presented *no* evidence whatsoever to establish that any specific element found in EZ Fold is equivalent to the slidably-mounted movable end element specifically recited in the patent claims" (Opp. 3). This statement is contradicted by **both** the district court **and** the Federal Circuit opinions, each of which noted the evidence presented by Freedman below demonstrating that the moveable end of the accused EZ Fold seat was equivalent to the slidably-mounted moveable end of the '389 patent claims.²

¹ Indeed, Freedman notes that Supreme Court Rule 14.1(a) states that the questions presented should be "expressed concisely in relation to the circumstances of the case, without unnecessary detail," and "should be short." Freedman complied with Rule 14.1(a) by listing the questions presented, without providing unnecessary factual detail in the questions themselves, which detail was clearly set forth in the body of Freedman's petition. Respondents' suggestion that the questions presented are somehow deficient because they failed to "specify" the "elements" at issue is wholly inconsistent with Rule 14.1(a).

² The district court summarized the evidence presented by Freedman regarding the equivalence between the "moveable ends" of the accused and patented seats as follows:

[T]he dispute arises as to whether the '389 Patent's support member and moveable end is equivalent to that found in the accused device. According to [Freedman], the accused device's support member has a moveable end that is associated with the seatbase in an equivalent manner as the '389 Patent. [Freedman] argues that the sole difference between the claims in the '389 Patent and the accused device is that the accused

(Continued on following page)

Contrary to Respondents' mischaracterization, the record clearly reflects that Freedman presented **substantial** evidence in the district court below, which evidence was noted by the Federal Circuit, that the moveable end of the accused EZ Fold seat was equivalent to the moveable end of the '389 patent claims.

B. Freedman Does Not Contend That the Federal Circuit's Use of the "All-Elements Rule" Conflicts With Supreme Court Precedent

While Respondents attempt to suggest that this case is about the "all-elements rule," Respondents' suggestion both ignores the substance of Freedman's petition and once again mischaracterizes the factual record. First, Freedman does not dispute that the "all-elements rule," as

device has a support member with a moveable end that is *rotatably mounted to a fourth link* on the underside of the seatbase whereas the '389 Patent's claims cover a support member with a moveable end that is *slidably and rotatably mounted within a runner track* on the underside of the seatbase.

(App. 47) (emphasis in original). Likewise, the Federal Circuit summarized the evidence presented by Freedman regarding the district court's proper application of the "function-way-result" test:

Freedman asserts that in both the accused product and the '389 patent, mounting the support member to the seatbase serves the function of attaching the moveable end of the support member to the seatbase while still permitting the seatbase to move between the horizontal and vertical positions. Second, Freedman asserts that the '389 patent and the accused product perform this function in the same way, by providing the movable end of the support member with both translational and rotational motion relative to the seatbase. Finally, Freedman asserts that both devices achieve the same result, namely, "the repositioning of the movable end, from a first position near the midpoint of the seatbase when the seatbase is stowed, to a position near the aisle end of the seatbase when the seatbase is deployed."

(App. 15).

set forth by this Court in *Warner-Jenkinson Co., Inc. v. Hilton Davis Chemical Co.*, 520 U.S. 17 (1997),³ comprises a restriction on the doctrine of equivalents, which the Federal Circuit properly acknowledged. Freedman's position is that the Federal Circuit applied the all-elements rule improperly, by disregarding undisputed evidence that each element of Freedman's patent claims was present in the accused EZ Fold seat, either literally or through an equivalent, and then inappropriately applied its questionable "foreseeability" doctrine (first set forth by the Federal Circuit in *Sage Products, Inc. v. Devon Industries, Inc.*, 126 F.3d 1420, 1425 (Fed. Cir. 1997)) to find non-equivalence of an interchangeable element, as a matter of law.

Further, Respondents once again erroneously suggest that Freedman somehow "fail[ed] to present evidence that EZ Fold had any element equivalent to the 'slidably mounted' moveable end expressly recited in all of the claims of the '389 patent" (Opp. 4). Again, this statement is simply *false*, in view of the substantial evidence of equivalence between those elements presented by Freedman below, as noted in both the district court and Federal Circuit opinions (see Sec. A.2, *supra*).

Finally, while Respondents argue that "the Federal Circuit did not use 'foreseeability' in any sense contrary to this Court's precedent," Respondents completely ignore the fundamental inconsistency between (i) the Federal Circuit's holding that the doctrine of equivalents is not

³ This Court summarized the "all-elements rule" as follows:

Each element contained in a patent claim is deemed material to defining the scope of the patented invention, and thus the doctrine of equivalents must be applied to individual elements of the claim, not to the invention as a whole. It is important to ensure that the application of the doctrine, even as to an individual element, is not allowed such broad play as to effectively eliminate that element in its entirety.

Warner-Jenkinson, 520 U.S. at 29.

applicable in this case, based on the fact that the **interchangeability** of Respondents' accused structure was "foreseeable" to the '389 patent inventors, and (ii) this Court's precedent, as reaffirmed in *Warner-Jenkinson*, that where the substitution of a claimed element with an accused element is known to persons skilled in the art to be **interchangeable**, the "foreseeability" that those elements can be interchanged for one another is an important factor that weighs in favor of, not against, a finding of equivalence. Respondents simply pretend that no such inconsistency exists, hoping that this Court will ignore it as well.

C. Freedman's Description of the "Moveable End" in the Accused EZ Fold Seat is Supported by the Record

Respondents erroneously argue that Freedman's description of the "moveable end" in the accused EZ Fold seat, as comprising the end of the EZ Fold diagonal truss which is attached to one end of the EZ Fold's "fourth link," with the other end of the "fourth link" being fixed to the bottom of the seatbase, was "not supported by the record in the district court and was properly rejected by the Federal Circuit" (Opp. 2). Respondents are wrong.

Notably, in the proceedings before the district court, Respondents did not even contest the issue of where the "moveable end" was located in the accused EZ Fold seat, but rather based their argument for non-equivalence on purported differences in the "distribution of forces" exerted on the seatbase and the support member in the accused and patented devices – an argument that was soundly rejected by the district court (App. 49-51). Indeed, the district court's opinion clearly noted Freedman's claim that the "moveable end" in the accused EZ Fold seat comprised the end of the EZ Fold diagonal truss that is "rotatably mounted" to the EZ Fold's "fourth link":

[Freedman] argues that . . . the accused device has a support member with a moveable end that

is *rotatably mounted to a fourth link* on the underside of the seatbase. (App. 47) (emphasis in original).

Furthermore, the Federal Circuit did **not** hold that the "moveable end" in the EZ Fold is the point at which the "fourth link" is fixed to the seatbase, as Respondents suggest. Rather, the Federal Circuit simply noted that the "moveable end" of the EZ Fold support member "is rotatably mounted to the seatbase," but does not **directly** contact the seatbase so as to "slide or otherwise move along the seatbase" (App. 7). This is entirely consistent with the district court's determination that the EZ Fold's "moveable end" is the end of the support member that is "rotatably mounted to a fourth link on the underside of the seatbase" (App. 47). The Federal Circuit's description of the moveable end of the support member in the accused EZ Fold seat, as being "rotatably mounted to the seatbase," is likewise consistent with the following description of the accused device, which the parties agreed below was accurate:

[Respondents'] device utilizes a brace [support member] connected to an intermediate [fourth] link. Due to this intermediate [fourth] link, the upper end of the brace does not contact with the seat base to support it. As the seat of the device pivots upward to the stowed position, the diagonal brace swings away from the bottom of the seat. (App. 36, n.5).

Moreover, Respondents concede that the "moveable end" of the EZ Fold's diagonal brace is provided "with translational and rotational motion" relative to the seatbase, by being "rotatably mounted to a fourth link on the underside of the seatbase" (App. 47), just as the "moveable end" of the '389 preferred embodiment's diagonal truss is provided "with translational **and** rotational motion" relative to the seatbase, by being "slidably mounted within a runner track" on the underside of the seatbase (App. II-6, '389 patent, col. 3, lines 41-56). Based on this fact, the